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in the Supreme Court of the United States

OCTOBER TERM 1988

ROLANDO ZALDIVAR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAY R. MOSKOWITZ, ESQUIRE
Counsel of Record
SANDS & MOSKOWITZ, P.A.
300 Bayview Executive Plaza
3225 Aviation Avenue
Coconut Grove, Florida 33133
(305) 285-1500

Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether a conviction of being the head of a continuing criminal enterprise (21 U.S.C. §848) may stand where the bulk of the evidence of leadership is based upon hearsay?

LIST OF INTERESTED PERSONS

The only parties having an interest in the outcome of this case are the Petitioner, his family, the United States of America and their respective counsel, who were:

Donald I. Bierman, Esquire
Bierman, Shohat, & Loewy, P.A.
Miami, Florida
trial counsel for Zaldivar

Benton Becker, Esquire
Coral Gables, Florida
and
Arthur Berger, Esquire
Miami, Florida
appellant counsel for Zaldivar

Jay R. Moskowitz, Esquire
Coconut Grove, Florida
counsel for Zaldivar in this Court

Wilmer Parker, III
Assistant United States Attorney
Northern District of Georgia
the prosecutor
and
Office of the Solicitor General
United States Department of Justice
Washington, D.C. 20530

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

ROLANDO ZALDIVAR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petitioner, ROLANDO ZALDIVAR, respectfully prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on March 2, 1989.

OPINIONS BELOW

The judgment and order of the Court of Appeals is reproduced in the Appendix attached hereto and is reported as United States v. Bissell, 866 F.2d 1343 (11th Cir. 1989). A petition for re-hearing was denied on April 13, 1989 and a copy of that denial is also reproduced in the Appendix.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment from which review is sought was rendered March 2, 1989 and a petition for re-hearing was denied on April 13, 1989. A motion to extend the time within which to file this petition was forwarded to this Court and on June 29, 1989, it was granted by Justice Anthony M. Kennedy thereby extending

the time to file the instant petition until July 12, 1989. The order is reprinted in the Appendix.

STATUTES AND RULES INVOLVED

Title 21, United States Code, Section 848: Continuing criminal enterprise

* * *

Continuing criminal enterprise defined

(b) . . . , a person is engaged in a continuing criminal enterprise if-

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter-

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Rule 801, Federal Rules of Evidence

Rule 801. Definition

* * *

(d) Statements which are not hearsay. A statement is not hearsay if-

* * *

(2) Admission by party-opponent. The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS

Petitioner Rolando Zaldivar went to trial on a second superceding indictment returned by a Federal Grand Jury sitting in the Northern District of Georgia which charged numerous defendants with various crimes. Zaldivar was charged in five counts as follows: Count One charged commission of a RICO conspiracy [18 U.S.C. §1962(d)]; Count Two charged commission of RICO [18 U.S.C. §1962(c)]; Count Five charged commission of a continuing criminal enterprise, i.e. CCE [21 U.S.C. §848]; Count Eleven charged conspiracy to import cocaine [21 U.S.C. §963]; Count Twelve charged conspiracy to possess cocaine with intent to distribute [21 U.S.C. §846].

The case had been severed by the District Judge into three trials and the Petitioner went to trial with six other individuals. 1 /

Following approximately four weeks of trial, the jury returned its verdicts, acquitting Petitioner Zaldivar of the RICO conspiracy and RICO counts, but convicting him of engaging in a continuing criminal enterprise, conspiracy to import cocaine and conspiracy to possess cocaine with intent to distribute.

Following his convictions, the Petitioner filed a motion for judgment of acquittal or, in the alternative, motion for a new trial which motion renewed his claim that the evidence was insufficient to sustain

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1 / Carlos Caraballo, Sr., Carlos Caraballo, Jr., Henry Caraballo, Jeffrey Bissell, Theophilos Nicholis, Maria Zaldivar.

his conviction for engaging in a continuing criminal enterprise. That motion was denied and on May 15, 1987, he was sentenced as follows: thirty (30) years incarceration for the continuing criminal enterprise(CCE) charge; twenty (20) years for each of the conspiracy charges to run consecutively with each other but concurrently with the CCE charge.

Also, fifty dollar special assessments were levied for each of the three convictions.

On appeal, the Eleventh Circuit affirmed his CCE conviction but vacated the two conspiracy convictions saying that they merge, as a matter of law, with the CCE convictions. United States v. Bissell, 866 F.2d 1343, 1348 (11th Cir. 1989).

The Petitioner has been incarcerated since his arrest.

STATEMENT OF NECESSARY FACTS

1.) Overview

The Government, at trial, proved a complex cocaine importation operation. Several successful and unsuccessful ventures were shown over the period June 1983 through February 1986 involving large quantities of cocaine. The details of these ventures are set out in the Eleventh Circuit opinion at pages A-4 through A-14 of the Appendix. See also United States v. Bissell, 866 F.2d 1343, 1345-1347 (11th Cir. 1989).

However, the Petitioner Rolando Zaldivar was not involved in all of the importations proven up nor were other members of his family. [2] The main players were the Caraballo

[2] In addition to the Petitioner, four other members of his family were charged: his wife and his three sons.

family. They were involved from the beginning and Carlos Caraballo, Sr. who was also charged and convicted, inter alia, of being the head of a continuing criminal enterprise (CCE-21 U.S.C. §848) was shown to be the major participant.

Rolando Zaldivar first came onto the scene in October of 1985 in conjunction with a proposed importation of approximately 600 kilograms of cocaine to Cuthbert, Georgia (hereinafter - "the Cuthbert venture"). [The plan failed, the importation plane running out of fuel and landing in Alabama where it was abandoned along with its illicit cargo.] It was through evidence involving the planning for and activities related to this venture that the bulk of the matters pertaining to Rolando Zaldivar arose.

They came in two parts: what he did and what others (particularly his son, co-defendant Miguel (Mike) Zaldivar said he did.

2.) Evidence as to Rolando Zaldivar

The evidence as it relates to Rolando Zaldivar came from acts of the Petitioner and statements made by others both in and out of his presence. In brief, the evidence adduced at trial is as follows:

(1.) planning meetings were held at his house attended by various charged co-conspirators;

(2.) on one occasion, Mike Zaldivar (the Petitioner's son), told others that "they" had smuggled cocaine from the Bahamas via a yacht and the Petitioner showed a picture of the yacht;

(3.) Mike Zaldivar bought a

plane for use in the Cuthbert venture. Trial testimony indicated that Mike said that he needed his father's approval to purchase the plane. It should be noted that after the plane was purchased Mike ordered modifications that would result in greater range capacity of the plane;

(4.) At the Zaldivar house, there were discussions among the various charged co-conspirators about payload capacity. Discussions were in English with Mike Zaldivar translating for his father into Spanish. Mike said that his father wanted the flight plan re-computed. When it was suggested that the amount of cocaine be reduced, Carlos Caraballo, Sr., said he was obligated to import 600 kilograms;

(5.) On one occasion, the Petitioner inquired of another co-

conspirator as to the going price of a kilo of cocaine in Miami;

(6.) There was testimony that Mike had related that his father and Carlos Caraballo, Sr., were 50/50 partners in the Cuthbert venture;

(7.) The Petitioner, his wife and Mike leased private planes in conjunction with the venture;

(8.) After the mission was aborted and the cocaine lost, Rolando Zaldivar was quite upset and voiced this anger.

REASONS FOR GRANTING THE WRIT

ACTS OF THE DEFENDANT HIMSELF RATHER THAN HEARSAY STATEMENTS OF OTHERS MUST ESTABLISH HIM TO BE THE HEAD OF A CONTINUING CRIMINAL ENTERPRISE

The Petitioner respectfully asks this Court to grant Certiorari in this case to address the important issue of whether in determining if there exists sufficient evidence to sustain a conviction for being the head of a continuing criminal enterprise statements of co-conspirators can be considered. This issue is of growing importance today in that Congress has recently modified the statute scaling the penalties upward to mandatory life in certain circumstances.

That there was sufficient evidence from which a jury could find the Petitioner guilty of being a member

of a conspiracy to import and to possess cocaine with intent to distribute is beyond question. The issue here is whether there was sufficient evidence to show the Petitioner to be the head of a continuing criminal enterprise. In making that determination, the Petitioner submits that evidence of his acts and statements and those made by co-conspirators in his presence and with h understanding should be considered and not hearsay statements of co-conspirators even though such statements could normally be used against him pursuant to Rule 801(d)(2)(E), Federal Rules of Evidence.

The continuing criminal enterprise statute (21 U.S.C. §848) is among the most serious of all federal

criminal statutes. See United States v. Darby, 744 F.2d 1508, 1527 (11th Cir. 1984). This Court has said that it is "designed to reach the 'top brass' in the drug rings, not the lieutenants and foot soldiers." Garrett v. United States, 471 U.S. 773, 781, 105 S. Ct. 2407, 2413 (1985) [emphasis added].

To establish a violation of 21 U.S.C. §848, the Government must prove:

(1) a violation of the federal narcotics laws;

(2) as part of a continuing series of violations;

(3) in concert with five or more persons;

(4) for whom the defendant is an organizer or supervisor;

(5) from which he derives substantial income or resources

United States v. Boldin, 818 F.2d 771, 774 (11th Cir. 1987); 21 U.S.C. §848

Here, the Petitioner restricts his argument to the fourth element set out above, that he was an organizer or supervisor. He submits that there was insufficient proof that he held such a position of authority but for the statements of his son Mike. By his actions and by the statements made by others in his presence for which he was shown to understand, there was not sufficient evidence of his holding such a leadership role.

Certainly with the inclusion of Mike Zaldivar's statements of supposed conversations with his father, a jury could have found evidence of Rolando's supervisory position. But the truthfulness of Mike's statements could never be tested. He was not a

witness at the trial. Testimony came from third party-witnesses who relayed what Mike had told them. The Petitioner recognizes that Rule 801(d)(2)(E), Federal Rules of Evidence, classifies a co-conspirator's statement made during the course of and in furtherance of the conspiracy as admissible as not being hearsay. Bourjaily v. United States, ___U.S.___, 107 S.Ct. 2775 (1987). However, in the context of an 848 charge, it is submitted that to allow a conviction of one as an organizer or supervisor based upon such hearsay would be unjust and a violation of due process and a defendant's right of confrontation.

In determining whether and under what terms to admit hearsay statements on the issue of whether a

defendant is an organizer/supervisor, it should not be enough that those statements are made by a co-conspirator. This is not just a conspiracy charge. It is much more. There first should be acts or statements by the defendant himself not just to show he was a member of the conspiracy but also tending to show that he is the organizer/supervisor. Then and only then should hearsay statements be admitted on the issue of organizer/supervisor.

The Petitioner is not asking this Court to re-visit its decision in Bourjaily v. United States, supra, but only to limit and clarify it in the context of 21 U.S.C. §848 and the manner and means by which the Government should be required to prove one an organizer or supervisor of a

major drug enterprise.

Here, the Petitioner spoke little English. His son Mike translated all conversations to him in Spanish. Mike was heavily involved in the planning and carrying out of the operation. It would have been very easy for him, in speaking with the non-Spanish speaking members of the scheme, many of whom were witnesses for the Government at trial and from whom the jury heard what Mike said his father had instructed, to place his father in a position of authority above him to remove himself from responsibility or leadership when in fact he was the organizer and supervisor. In fact, on the one occasion when Rolando Zaldivar did communicate directly in English with a person who later became a

witness he asked about the going price for a kilo of cocaine in Miami, not a question an organizer/supervisor should have to ask. [3]

Carlos Caraballo, Sr., was found to be an organizer/supervisor. He was the one who demanded that 600 kilos be on the plane (see statement of facts) when weight requirements should have dictated otherwise. Certainly there can be more than one "ring leader" to a particular enterprise. United States v. Boldin, 818 F.2d 771, 776 (11th Cir. 1987); United States v. Phillips, 664 F.2d 971 (5th Cir. Unit B 1981). [4]

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3 / The Petitioner was a Miami resident.

4 / There is a currently emerging split among the circuits as to whether one can be convicted of 21 U.S.C., §848 as an aider and abettor (18 U.S.C. §2). See United States v. Pino-Perez, 870 F.2d 1230 (7th Cir. 1989) and United States v. Amen, 831 F.2d 373 (2nd Cir. 1987).

But here discounting the hearsay statements of Mike Zaldivar there was insufficient evidence to show Rolando Zaldivar to have been one of the ring leaders.

A jury finding that one is an organizer or supervisor of a major drug operation should not rest upon the hearsay statements of another. It should be based upon acts and statements of the accused.

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

JAY R. MOSKOWITZ, ESQUIRE
Counsel of Record
SANDS & MOSKOWITZ, P.A.
Suite 300
Bayview Executive Plaza
3225 Aviation Avenue
Coconut Grove, FL 33133
(305) 285-1500

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of July, three copies of the Petition for Writ of Certiorari were delivered by mail to the Solicitor General, Department of Justice, Washington, D.C. 20530 and to Wilmer Parker, III, Assistant United States Attorney, Northern District of Georgia, Suite 1176, 75 Spring Street, S.W., Atlanta, Georgia 30303.

JAY R. MOSKOWITZ, ESQUIRE

A P P E N D I X

UNITED STATES of America,
Plaintiff-Appellee

v.

Jeffrey Michelotti BISSELL and
Theophilos E.M. Nicholis,
Defendants-Appellants.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Carlos CARABALLO-SANDOVAL and
Henry Caraballo-Sandoval,
Defendants-Appellants.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Rolando ZALDIVAR, Sr.,
Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Carlos CARABALLO-LUJAN,
Defendant-Appellant.

Nos. 87-8246, 87-8311, 87-8395
and 87-8504

United States Court of Appeals,
Eleventh Circuit.

March 2, 1989.

Defendants were convicted of conspiring to transport cocaine into United States by the United States District Court for the Northern District of Georgia, Nos. CR86-149-12A, CR86-149A, CR86-149-4A and CR86-149-1A, Robert H. Hall, J., and they appealed. The Court of Appeals, Hill, Circuit Judge, held that: (1) pretrial restraint of all of defendants' assets, upon finding by judge that there was probable cause to believe that assets were derived from drug trafficking, did not violate defendants' Sixth Amendment right to counsel; (2) eight-month delay between pretrial restraint and trial of criminal case, at which court finally determined that defendants' assets were subject to forfeiture, did not deprive defendants of property in violation of due process; and (3) narrowing of theory of misconduct alleged in indictment, by striking surplus

counts against defendants who had been granted separate trial, did not violate defendants' Fifth Amendment right to be prosecuted pursuant to indictment returned by grand jury.

Affirmed in part and vacated in part.

Before HILL and FAY, Circuit Judges, and DUBINA*, District Judge.

HILL, Circuit Judge:

A jury convicted Carlos Caraballo-Lujan, Carlos Caraballo-Sandoval, Henry Caraballo-Sandoval, Rolando Zaldivar, Jeffrey Bissell and Theophilos Nicholis for their participation in a conspiracy to import cocaine into the United States from

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* Honorable Joel F. Dubina, U.S. District Judge for the Middle District of Alabama, sitting by designation.

Colombia, South America. The conspiracy committed several acts of cocaine importation between 1983 and 1986, involving numerous other co-conspirators. In this appeal, we consider thirteen issues, and, for the reasons stated below, we hold that no reversible errors occurred in the trial of this case.

I

On or about June/July 1983, Carlos Caraballo-Lujan (Carlos Caraballo, Sr.), and h son, Carlos Caraballo-Sandoval (Carlos Caraballo, Jr.), arranged to smuggle approximately 300 kilograms of cocaine from Colombia into the United States. They met with co-conspirator Marty Daniel, who testified for the government at trial, and asked him to find a pilot, an airplane and a landing strip. Accordingly, Daniel introduced the Caraballos to appellant Theophilos Nicholis, an experienced pilot

who had previously been involved in smuggling marijuana from Jamaica into the United States.[1] Nicholis agreed to smuggle the drugs, and Carlos Caraballo, Sr. paid the pilot $25,000 to prepare an airplane for the trip. The preparations, however, did not go smoothly. Nicholis encountered difficulties in locating a clandestine landing strip and in solving his airplane's fuel consumption problems. As a result, Nicholis stalled, and Carlos Caraballo, Sr. grew impatient. Carlos, Sr. ordered Marty Daniel to retrieve the $25,000 from Nicholis. Daniel did so, and Carlos Caraballo, Sr. found another pilot who successfully smuggled the cocaine.

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1 The government introduced at trial certified copies of Nicholis' conviction in 1981 for flying marijuana into the United States in violation of 18 U.S.C. §1952(a).

A second importation of 300 kilograms of cocaine occurred in May/June 1984. Appellant Carlos Caraballo, Jr. requested the help of Marty Daniel in locating another pilot. That pilot was David Burt, who also testified for the government at trial. Burt met with Carlos Sr., Carlos Jr., appellant Henry Caraballo-Sandoval -also a son of Carlos, Sr.-and other co-conspirators to plan the trip. Burt proposed to fly an airplane laden with cocaine from Colombia over the Yucatan Peninsula into an area full of oil derricks in the Gulf of Mexico. At that point, he would fly his airplane at a slow speed and at a low altitude, as would an oil supply helicopter, in order to avoid radar detection by law enforcement authorities. Further, he proposed to land the airplane at a clandestine landing strip in Pike County, Georgia which lies in the

Northern District of Georgia. The conspirators agreed with the plan, and subsequently, Carlos Sr. offered Burt over $200,000 to make the trip. While not agreeing on a price, Burt nonetheless agreed to fly for the Caraballos. Preparations then ensued, which included the installation of an extra fuel tank in the airplane and frequent trips by the conspirators to Atlanta and Pike County in order to survey the landing strip.

Burt completed a successful flight to Colombia and back to Georgia, bringing with him 300 kilograms of cocaine. Carlos, Sr. and other co-conspirators met Burt at the Pike County landing strip. They unloaded the cocaine and stored it at a farm near Cordelle, Georgia where Carlos Caraballo, Jr. awaited. The Caraballos then arranged for a drug courier to transport the cocaine to Miami. Carlos, Jr.

paid burt only $100,000 for his services, while Henry Caraballo paid Marty Daniel for his efforts by delivering to him four kilograms of cocaine. Daniel and Burt were upset with the payments since they fell far short of their expectations. However, after the conspirators threatened to kill Daniel upon further complaints, Daniel and Burt protested no further.

In March, 1985, the conspirators again attempted to smuggle cocaine into the United States. The Caraballos employed a new pilot, appellant Jeffrey Bissell. Bissell, together with co-conspirator Cappy Verplank, planned to fly an airplane to Colombia, fill it with cocaine, and then fly it to Long Island in the Bahamas. The cocaine would be smuggled subsequently into the United States. The plan failed, however, because low fuel and bad weather forced Bissell to land on Lee Stocking

Island, a private island in the Exuma chain of the Bahamas. Upon landing, the island's security guard, Robert Wicklund, apprehended Bissell and Verplank, accusing them of being drug smugglers. Bissell responded, "I guess you figured that out." Later, Bahamian authorities arrested Bissell and Verplank, and a search of the landing strip revealed eighteen duffel bags containing approximately 691 kilograms of cocaine and a maroon bag. Bissell confessed to Bahamian authorities that the maroon bag belonged to him. The capture of the pilots and cocaine ended the smuggling operation.

Not to be deterred, the Caraballos sought to import another cargo of 600 kilograms of cocaine in October, 1985. To accomplish the venture, the Caraballos expanded their operation into a 50/50 partnership with appellant Rolando

Zaldivar and his organization. Also, the conspirators employed yet another new pilot, Steve Smith, who, like co-conspirators Marty Daniel and David Burt, cooperated with the government in this case. Smith would fly a Mitsubishi MU 2 aircraft purchased by Zaldivar between Colombia and a clandestine airstrip in Georgia. Initially, the conspirators considered using the Pike County, Georgia airstrip, and they traveled to the Northern District of Georgi to survey the facility. But, in the end, the conspirators chose a landing strip in Cuthbert, Georgia provided by two undercover agents of the Drug Enforcement Administration (DEA).

Numerous planning sessions occurred at the home of appellant Zaldivar in anticipation of smuggling 600 kilograms of cocaine in October, 1985. At one session attended by Rolando Zaldivar, Carlos, Sr.,

Carlos, Jr., Henry Caraballo, Rolando Zaldivar's three sons, co-conspirator Carlos Vasquez (a/k/a "Fat Carlos"), Marty Daniel and pilot Steve Smith,, the conspirators vigorously debated how much cocaine could be transported in the MU 2 aircraft. For example, Zaldivar's son, Miguel Zaldivar, told his father that the airplane would be dangerously overweight, necessitating a reduction in the amount of cocaine. However, Zaldivar ordered his son and the other conspirators to recompute figures relating to the airplane's fuel capacity and range. Similarly, when pilot Smith suggested a reduction in the amount of cocaine to Carlos, Sr., Carlos, Sr. refused to consider the idea, stating that he was committed to smuggling 600 kilograms. In the end, the fathers had their way, and the conspirators settled on a plan in which the airplane would carry

600 kilograms of cocaine between Colombia and Cuthbert, Georgia.

This plan failed also, however. The MU 2 ran out of fuel, and pilot Smith landed the airplane at Bay Minnette, Alabama. Smith abandoned the airplane and the cocaine on board. While Smith was aborting the trip, the conspirators, including the three Caraballos and undercover DEA agents, waited at the landing strip. At 3:30 a.m., the conspirators received news of Smith's landing at Bay Minnette. They attempted to salvage the cocaine, but law enforcement authorities seize the MU 2 and approximately 566 kilograms of cocaine. Thereafter, the conspirators blamed Steve Smith and Marty Daniel for the failure at Bay Minnette. Rolando Zaldivar was particularly enraged at losing the cocaine. Zaldivar's son, Miguel, informed Smith and Daniel that

their lives were in peril. However, at a meeting attended by the Caraballos and Rolando Zaldivar, the conspirators decided that no one would be killed.

Subsequently, DEA undercover agents maintained their relationship with the Caraballos. In January, 1986, for instance, Carlos, Jr. and Henry Caraballo proposed another smuggling venture to the agents. That venture never matured. Nevertheless, during this period, Carlos, Jr. managed to import successfully 100 kilograms of cocaine into Washington, D.C. The DEA finally arrested the Caraballos on May 29, 1986. A search of the Caraballo home pursuant to a warrant revealed 17 kilograms of cocaine, nine weapons, including an illegal machine gun, and $120,000 in U.S. currency. Also, on June 2, 1986, pursuant to a search warrant, the government found 45 kilograms of cocaine in a

warehouse in Hialeah, Florida, leased by a corporation owned by Henry and Carlos Caraballo, Jr.

A grand jury sitting in the Northern District of Georgia returned an indictment on April 10, 1986, a superceding indictment on May 15, 1986, and a second superceding indictment on July 8, 1986, which charged forty-one defendants with various violations of federal narcotics laws. The grand jury charged, *inter alia*, that the three Caraballos, Rolando Zaldivar and Nicholis had violated the Racketeer Influenced And Corrupt Organizations Act (RICO), 18 U.S.C. §1961 *et seq.*, and that Zaldivar and Carlos, Sr. had engaged in a Continuing Criminal Enterprise (CCE), in violation of 21 U.S.C. §848. Bissell was charged with conspiring to import cocaine. In addition, the superceding indictments contained several forfeiture counts pur-

suant to 21 U.S.C. §853, in which the grand jury alleged that all assets derived from, or devoted to, violations of federal narcotics laws were subject to forfeiture upon appellants' convictions. Consequently, the government imposed pretrial restraints on those assets in order to preserve them pending trial. For example, the government obtained *ex parte* warrants which froze assets in bank accounts belonging to the Caraballos. The warrants described the bank accounts and the district court's probable cause determination that the assets were derived from drug trafficking. The government executed the warrants, thereby securing the assets and rendering them unavailable to the appellants before trial.

Ultimately, the case against the forty-one defendants was severed into three trials, and the six appellants were tried jointly and convicted for their roles in the conspiracy.[2] The appellants raise

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2 The jury rendered the following verdicts:
(A) Carlos Caraballo, Sr. was found guilty as follows: (1) of involvement in a RICO enterprise, in violation of 18 U.S.C. §1962(d) and (c) (counts 1 and 2); of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. §848 (count 3); of importing and possessing cocaine with intent to distribute, in violation of 21 U.S.C. §952 and 21 U.S.C. §841(a)(1) (counts 8 and 9); of conspiracy to import and possess cocaine with intent to distribute, in violation of 21 U.S.C. §963 and 21 U.S.C. §846 (counts 11 and 12); of traveling in interstate commerce in order to manage and establish a smuggling operation, in violation of 18 U.S.C. §1952(a)(3) (counts 17, 18, 19, 21); and of tax fraud, in violation of 26 U.S.C. §7206(1) (counts 24 and 25).

thirteen issues on appeal. They challenge (1) the constitutionality of the *ex parte*, pretrial restraints on their assets, (2) the striking of certain surplus informa-

(2. cont'd)

(B) Carlos Caraballo, Jr. was convicted of the RICO offenses, of importing and possessing cocaine with intent to distribute, of conspiring to import and possess cocaine with intent to distribute, and of traveling in interstate commerce for the purpose of managing a smuggling operation.

(C) Henry Caraballo was found not guilty of importation of cocaine charged in count 8. However, he was convicted of RICO offenses, of possessing cocaine with intent to distribute, and of conspiracy to import and distribute cocaine.

(D) Rolando Zaldivar was acquitted of RICO charges, but he was convicted of managing a continuing criminal enterprise and of conspiring to import and distribute cocaine.

tion from the indictment and (3) the government's proof at trial which, according to the appellants, varied from the terms of the indictment. Also, appellants contest the district court's denial of their motions for (4) severance, (5) change of venue, (6) suppression, (7) exclusion of prior crime evidence, and (8) exclusion of co-conspirator evidence. Furthermore, the appellants claim (9) that

(2. cont'd)

(E) Theophilos Nicholis was acquitted of RICO charges and of traveling in interstate commerce in aid of racketeering (count 16). Nevertheless the jury found him guilty of conspiring to import and distribute cocaine.

(F) Jeffrey Bissell was convicted of conspiring to import and distribute cocaine.

DEA agents and the prosecutor committed misconduct, (10) that the government committed violations of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), (11) that the district court erred in denying their requested jury instructions and in charging the jury, (12) that the district court erred in sentencing Carlos Caraballo, Sr. and Henry Caraballo, and, finally, (13) that the evidence was insufficient to sustain their convictions.

Having carefully reviewed the record and briefs, we find that appellants' contentions in issues three through twelve are without merit. Further, we hold that the evidence supported all of the appellants' convictions. However, since we affirm the CCE convictions of Carlos

Caraballo-Lujan and Rolando Zaldivar, we must vacate their convictions and sentences under the conspiracy counts (counts 11 and 12) because they merge, as a matter of law, with the CCE convictions. *United States v. Cruz*, 805 F.2d 1464, 1468 (11th Cir. 1986); *United States v. Harrington*, 761 F.2d 1482, 1487 (11th Cir. 1985). We now consider the remaining issues.

II

1. Pretrial Restraints of Assets.

A. The Statutory Provisions

[1,2] Pursuant to 21 U.S.C. §853(a), defendants convicted of serious federal narcotics offenses must forfeit to the United States any assets derived from, or

used in, the commission of those crimes.[3] Forfeiture, as with the commission of an offense, is alleged in an indictment or information. To preserve forfeitable

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3. 21 U.S.C. §853 is a criminal, as opposed to a civil, forfeiture statute. A criminal forfeiture operates *in personam* against the defendant, serving as a penalty upon conviction. A civil forfeiture operates *in rem* against the property itself under the theory that the property is guilty of wrong-doing. *See* Brickey, *Forfeiture of Attorneys' Fees: The Impact Of RICO and CCE Forfeitures On The Right To Counsel*, 72 Va.L. Rev. 493, 494-95 (1986). Also, 21 U.S.C. §853 is virtually identical to the forfeiture provisions in RICO, *see* 18 U.S.C. §1963, since both statutes resulted from Congress' revisions of RICO and CCE penalties in the Comprehensive Forfeiture Act of 1984, Pub.L. No. 98-473, 98 Stat. 2040 (1984). Therefore, our discussion and holdings apply equally to the forfeiture provisions in 21 U.S.C. §853 as to those found in 18 U.S.C. §1963.

assets for a possible conviction, the district court may restrain the defendant from using these assets before trial. The restraints may be imposed by way of a restraining order, an injunction, the execution of a performance bond, or a temporary seizure of certain assets which, because of their liquidity, can be readily transferred or hidden. 21 U.S.C. §853(e)(1)(A) and (f). Moreover, once an indictment has issued, the court may order such restraints *ex parte*. *Id.* These restraining order provisions do not, on their face, require a hearing either prior to, or after, the imposition of restraints on defendants' assets. The statute's legislative history reveals that while Congress did not intend for there to be a hearing

prior to the issuance of a restraint, the district court does retain authority to hold a post-restraint hearing. S.Rep. No. 225, 98th Cong., 1st Sess. 191, 203, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3386. At that hearing, the defendant may undertake to prove that the government wrongfully restrained specific assets which are outside the scope of the indictment, not derived from, or used in, criminal activity, but may not challenge the validity of the indictment itself and thus require that the government present its evidence before trial.

The reason for restricting the defendant's control over allegedly illicit assets is to preserve the government's claim of ownership to these assets and to

protect its right to possession of the assets when and if its claim is vindicated at trial. That claim is founded on the principle that the fruits and instrumentalities of a crime do not belong to the criminal, but rather to the government. The statute vests the government with legal title to illicit assets *at the time the offense is committed.*[4] As such, the govern-

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4. 21 U.S.C. §853(c) provides:

> All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States,

ment's interest is said to "relate back " to the time of the criminal act. Of course, final adjudication of the government's claim is not resolved until trial, at which time the defendant may ultimately be found entitled to these assets should the government fail to prove its case for forfeiture. Inasmuch as under the relation back provision the government asserts a significant claim to the defendant's assets before trial, the pretrial re-

(4. cont'd)

> unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

straint provisions in section 853 protect that claim by preserving these assets for possible forfeiture.

[3] As a consequence of the provisions in section 853, an attorney retained to defend one whose assets are subject to forfeiture and restraint may go uncompensated. This would be the case where, as here, all of the defendant's assets are alleged to be subject to forfeiture and are thus unavilable for any use. If the defendant is convicted, the attorney will have no right to assets once in possession of his client because the government's title--vesting at the time of the offense--will usually predate the attorney's

claim.[5] This scenario may cause many law-

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5. The statute does provide two ways in which a third person may defeat the government's title to a defendant's assets in a post-conviction hearing. However, an attorney will not likely be in a position to satisfy the requirements of the statute. Under 21 U.S.C. §853(n)(6)(A), the third person may petition the court for a hearing subsequent to the entry of a judgment of forfeiture in order to prove that his title to a forfeitable asset preceded the defendant's title or possession. This would be the case, for example, of the third person owned a boat which he innocently leased to a drug smuggler who was subsequently apprehended. Proof of the lessor's non-involvement in the smuggling would likely entitle him to reclaim his boat. An attorney may be expected to have a difficult time proving superior title to his client's assets since legal services are generally not sought until after the commission of the alleged crime. At that point, the government's interest under the rela-

yers to refuse representation of a defendant whose apparent asses are frozen before trial and which may be subject to forfeiture upon conviction. Because this circumstance has raised Sixth Amendment concerns with some judges, courts have ruled that section 853 exempts funds to be

(5. cont'd)

tion back provision already predates the attorney's interest. Another way to defeat the government's title in a post-conviction hearing is to prove one's status as a bona fide purchaser for value. Such proof entails a showing that the third person purchased the asset from the defendant without cause to believe that it was subject to forfeiture. 21 U.S.C. §853(n)(6) (B). It is unlikely that an attorney will ever achieve this status since he is the most likely person to appreciate the forfeitability of his client's assets. In sum, the attorney will usually fail in attempting to defeat the government's title in a post-conviction hearing.

used for attorney's fees from pretrial restraints and forfeiture. *See, e.g., United States v. Rogers*, 602 F.Supp. 1332, 1348 (D.Colo. 1985); *United States v. Ianniello*, 644 F.Supp. 452, 455-6 (S.D.N.Y. 1985). We reach a different conclusion. The language and legislative history of section 853 evidence Congress' goal of reaching as many illegal assets as constitutionally permissible. Therefore, we agree with the conclusions of the Fourth, Seventh and Tenth Circuit Courts of Appeals that 21 U.S.C. §853 reaches all illegal funds, including those earmarked for payment to attorneys. *See: In re: Forfeiture Hearing As To Caplin & Drysdale*, 837 F.2d 637, 641-2 (4th Cir. 1988) (en banc), *cert. granted, Caplin & Drysdale, Chartered v. United*

States,—U.S.—,109 S.Ct. 363, 102 L.Ed.2d 352 (1988); *United States v. Moya-Gomez*, 860 F.2d 706, 723 (7th Cir. 1988); *United States v. Nichols*, 841 F.2d 1485, 1491-1496 (10th Cir. 1988). Given such a conclusion, however, we must decide the constitutional questions.

B. The Issues

"When the right point of view is discovered, the problem is more than half solved." *Ellison v. Georgia Railroad Company*, 87 Ga. 691, 706-707, 13 S.E. 809 (1891) (Bleckley, C.J.).

Appellants have questioned the constitutionality of those parts of RICO and CCE which provide for restraints upon money and other assets found in the possession of the appellants at the time of

the arrests. We find two principal issues involved in analyzing these provisions, and one issue may be divided into two parts. First, we must decide whether the restraint placed upon alienation of these assets violates the Sixth Amendment to the Constitution by making it impossible for defendants to secure the services of counsel of their choice. Second, we must analyze the due process clause implications of the application of such restraints. Attachment, sequestration, and other restraint placed upon property prior to judgment may, when done improperly, amount to the taking of property without due process of law. If the interference with the use of property does, itself, pass constitutional muster, we must yet

examine the implications resulting from the exercise of the power to restrain the alienation of assets by the same executive who is prosecuting criminal charges against those no longer able to use assets which has theretofore been in their possession.

It will be necessary that we obtain the right point of view. The issues ought not be viewed as involving the government's efforts to collect an indebtedness coincidentally with the prosecution of criminal charges. The position of the government is not that defendants are indebted to the government and that the assets seized or restrained ought to be applied to that indebtedness. The correct position is that none of the defendants

have ever owned any of these assets. All of the assets were the property of the government the moment they were derived from, or utilized in, the criminal activities condemned. The government's position is that the defendants have been found, perhaps as paupers, holding assets belonging to the government as to which the defendants have never had any more right than would a thief.

C. The Sixth Amendment Issue

[4] The Caraballo appellants do not contend that the government wrongfully restrained assets having no connection with criminal activity. That is, they do not claim that the government restrained non-forfeitable assets. Rather, the appellants contend that the Sixth Amendment

requires that enough funds be exempt from pretrial restraints and forfeiture to pay for counsel of choice and other litigation expenses. Specifically, they argue that the Sixth Amendment protects the individual's right to select and be represented by his preferred attorney with assets in his possession at the time of arrest. Moreover, appellants contend that the Sixth Amendment's guarantee of a fair adversarial process may be undermined by the government's power to force apparently wealthy defendants to indigence, thereby requiring appointment of counsel who may be inexperienced in trying complex RICO and CCE cases. As a result, the defense may be over matched. Thus, the appellants urge that to protect a Sixth Amendment

interest in a biforous adversarial process, as well as an individual's interest in selecting counsel of choice, the Constitution requires the exemption of funds which are sufficient to allow defendants to retain their preferred counsel. We disagree.

[5,6] The Sixth Amendment comprehends a qualified right to select and be represented by counsel of choice because "were a defendant not provided the opportunity to select his own counsel *at his own expense*, substantial risk would arise that the basic trust between counsel and client, which is a cornerstone of the adversary system, would be undercut." *United States v. Koblitz*, 803 F.2d 1523, 1528 (11th Cir. 1986) (emphasis added). But, as the quo-

tation implies, the right to counsel of choice belongs solely to criminal defendants possessing legitimate, uncontested assets. Here, the inclusion of appellants' assets in an indictment is an assertion that these particular defendants, no matter what the appearances of wealth may be, are and have been paupers ever since their apparent assets were accumulated through criminal conduct. As such, they have no legitimate assets with which to pay an attorney. An analogy from the Fourth Circuit illustrates this point:

> Suppose a bank is robbed and $100,000 taken. A defendant is arrested in possession of $100,000 and nothing more. The defendant protests his innocence and claims, without the slightest proof, that the $100,000 was in fact a gift from a friend. Surely no one will contend that the $100,000 must be made available to pay the

> defendant's lawyer, and not be kept available for return to the bank in the event the defendant is found guilty.

Caplin & Drysdale, 837 F.2d at 645. Similarly, the appellants here had no Sixth Amendment right to use assets to the extent that those assets belonged to the United States. That the appellants could not, as a result, afford private counsel is of no Sixth Amendment significance; a defendant may not insist on representation by an attorney he cannot afford. *Wheat v. United States* – U.S. –, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140 (1988).

Of course, indigence does not impair the defendant's right to a fair trial. The Sixth Amendment requires the appointment of counsel in every trial for a ser-

ious crime, *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and counsel must play "the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct 2052, 2063, 80 L.Ed.2d 764 (1984). This latter inquiry focuses on competency, and it is this criteria, rather than whether counsel is appointed or retained privately, that is critical to a fair trial. Otherwise, the government could not constitutionally prosecute defendants who happen to be without funds at the time of arrest. Having received competent representation by appointed counsel in this

case, the appellants, who had no uncontested assets with which to retain an attorney, suffered from no deprivation of their Sixth Amendment rights.[6]

D. The Due Process Issue

The statutory scheme in 21 U.S.C. §853(e)(1)(A) does not specifically provide for a hearing to challenge the merits of the government's case on forfeiture either prior to, or after, allegedly il-

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6. *Accord Caplin & Drysdale*, 837 F.2d at 646; *Moya-Gomez*, 860 F.2d at 725; *Nicholis*, 841 F.2d at 1505; *contra United States v. Unit No. 7 and Unit No. 8 of Shop In The Grove Condominium*, 853 F.2d 1445, 1450-1452 (8th Cir. 1988), *mandate stayed by United States v. Unit No. 7 and No. 8*, 864 F.2d 1421 (8th Cir. 1988) (Sixth Amendment requires exemption of assets sufficient to compensate counsel of choice); *United States v. Monsanto*, 852 F.2d 1400, 1402-04 (2d Cir. 1988) (en banc), *cert*

licit assets are restrained. The only hearing provided is the trial. The Caraballo appellants contend that this scheme violates due process. They argue that when pretrial restraints are imposed on assets, the Fifth Amendment requires a hearing on the merits at which the government must prove the probability that the defendant will be convicted and that his assets will be forfeited. Since no such hearing occurred in this case, appellants urge that they have been denied due process of law. We disagree.

(6. cont'd)

granted, *United States* v. *Monsanto*, — U.S. —, 109 S.Ct. 363m 102 L.Ed.2d 353 (1988) (Sixth Amendment requires exemption of attorneys fees from pretrial restraints and forfeiture).

[7] The Fifth Amendment provides that "[n]o person shall...be deprived of... property...without due process of law...." U.S. Const. amend V. This clause is implicated when, as here, persons are deprived of their possessory interests in property. *Fuentes v. Shevin*, 407 U.S. 67, 84, 92 S.Ct. 1983, 1996, 32 L.Ed.2d 556 (1972). The Fifth Amendment generally prohibits the deprivation of property without a *prior* hearing, *id.* at 90, 92 S.Ct. at 1999, but one exception to the need for a prior hearing exists when the government seizes items subject to forfeiture. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679-80, 94 S.Ct. 2080, 2089-90, 40 L.Ed.2d 452 (1974). Thus, appellants had no right to a hearing before the

government restrained their assets. We must consider whether appellants had a right to an immediate post-restraint hearing.

[8] Our analysis is guided by the Supreme Court's decision in *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) In United States Currency*, 461 U.S. 555, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983) *("United States v. $8,850)*. There, customs officials seized currency pursuant to the Bank Secrecy Act of 1970 and delayed the initiation of civil forfeiture proceedings for eighteen months. In the Supreme Court, the claimant argued that the eighteen month delay between seizure and the civil forfeiture trial violated her due process right to have a meaningful hearing at a

meaningful time. *Id.* at 562-3, 103 S.Ct. at 2010-11; *see Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). The Court analyzed the claim by applying the test of *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), which assesses when a delay in trying a criminal case violates the Sixth Amendment. The *Barker* test involves a weighing of four factors: The length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *Id.* at 530, 92 S.Ct. at 2191. The Court described the appropriateness of the test in the forfeiture contest as follows:

> Of course, *Barker* dealt with the Sixth Amendment right to a speedy trial rather than the Fifth Amendment

> right against deprivation of property without due process of law. Nevertheless, the Fifth Amendment claim here—which challenges only the length of time between the seizure and the initiation of the forfeiture trial— mirrors the concern of undue delay encompassed in the right to a speedy trial. The *Barker* balancing inquiry provides an appropriate framework for determining whether the delay here violated the due process right to be heard at a meaningful time.

United States v. $8,850, 461 U.S. at 564, 103 S.Ct. at 2012.

In applying *Barker*, the Court held that the eighteen month delay did not violate due process. *Id.* at 569-70, 103 S.Ct. at 2014-5. While the delay was significant, the government had valid justifications, and no evidence existed that the claimant had asserted her right to an early forfeiture trial as permitted by the relevant statute. Moreover, in assessing the pre-

judice element in *Barker*, the Court stated that its inquiry focused on whether the delay had hampered the claimant's defense on the merits. *Id.* at 569, 103 S.Ct. at 2014. Finding no prejudice, and in light of the other factors, the Court found no constitutional error. *Id.*

We conclude that the *Barker* test, as described in *United States v. $8,850*, applies here. While the Caraballos do not claim that the government delayed their trial, they challenge the absence of a hearing between the imposition of restraints on their assets and trial. The essence of this claim is the denial of a meaningful hearing at a meaningful time, precisely the issue considered in *United States v. $8,850*, *Id.* at 562-63, 103 S.Ct. at 2010-11.

In applying the *Barker* test, we conclude that the delay of approximately eight months between the initial restraints and trial is not significant. Most federal criminal proceedings will occur fairly rapidly under the Speedy Trial Act, 18 U.S.C. §3161 *et seq.*, and no unusual delay occurred in this case. *See United States v. Draine*, 637 F.Supp. 482, 485-86 (S.D.Ala. 1986) (five month delay between seizure of assets pursuant to 21 U.S.C. §853 and trial did not violate due process). As to the reason for delaying a hearing until trial, Congress stated the following:

> Although current law does authorize the issuance of restraining orders in the post-indictment period, neither the RICO nor CCE statute articulates any standard for the issuance of these

orders. Certain recent court decisions have required the government to meet essentially the same stringent standard that applies to the issuance of temporary restraining orders in the context of civil litigation and have also held the Federal Rules of Evidence to apply to hearings concerning restraining orders in criminal forfeiture cases. In effect, such decisions allow the courts to entertain challenges to the validity of the indictment, and require the government to prove the merits of the underlying criminal case and forfeiture counts and put on witnesses well in advance of trial in order to obtain an order restraining the defendant's transfer of property alleged to be forfeitable in the indictment. Meeting such requirements can make obtaining a restraining order—the sole means available to the government to assure the availability of assets after conviction—quite difficult. In addition, these requirements may make pursuing a restraining order inadvisable from the prosecutor's point of view because of the potential for damaging premature disclosure of the government's case and trial strategy and for jeopardizing the safety of witnesses and victim in racketeering and narcotics trafficking cases who would be required to testify at the restraining order hearing [Footnote Omitted]

S.Rep. No. 225 at 196 *reprinted in* U.S. Code Cong. & Admin. News at 3374. We find these reasons for delaying a full-blown hearing on the merits of the government's case until trial to be substantial, particularly in light of the government's compelling regulatory interest in preventing crime. *See United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 2103, 95 L.Ed.2d 697 (1987). Also, we do not ignore Congress' determination of its need to comply with the Fifth Amendment.

The third *Barker*—factor the defendant's assertion of his right to a judicial hearing—also weighs against appellants since they do not point to, and the record does not disclose, any motion for a hearing to

contest the government's restraints. Although the statute does not require the district court to hold a post-restraint hearing, the legislative history evidences that such a hearing may be held to determine whether legitimate assets– those outside the scope of the indictment– have been wrongfully restrained. Also, "[i]f a claimant believes the initial seizure was improper, he could file a motion under Federal Rule of Criminal Procedure 41(e) for a return of seized property." *United States v. $8,850*, 461 U.S. at 569, 103 S.Ct. at 2014. The appellants did not employ any of these procedures. Thus, nothing in the record indicates that appellants desired an early hearing to contest the government's restraints.

The final *Barker* element requires that we assess prejudice suffered by the defendant resulting from the absence of a post-restraint hearing. The clear danger posed by this statutory scheme is the possibility that perfectly legitimate assets will be wrongfully restrained. In such a circumstance, a defendant will incur prejudice to his right to enjoy his assets which is not insignificant. However, the fact that seizure is coincidental with charges of criminal violations for which appellants are required to stand trial tends to define the right most significantly prejudiced as the Sixth Amendment right to counsel of choice. Although the right is not absolute, it nevertheless protects the use of legitimate assets to

retain a lawyer and to pay for the often complex and expensive pretrial preparations required in RICO and CCE cases. *See Koblitz*, 803 F.2d at 1528. A wrongful deprivation of legitimate assets will severely impair the defense.

In balancing the potential prejudice to appellant's Sixth Amendment rights with the other *Barker* factors, our task is aided by *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974), in which the Court upheld the validity of a Louisiana sequestration statute permitting a seller-creditor holding a lien to secure, *ex parte*, a writ of sequestration issuable only by a judge. The Court held that due process did not require a hearing prior to the sequestration. *Id.* at 609, 94

S.Ct. at 1900. As such, *Mitchell* is not directly on point for the issue we consider here—the necessity of a post-restraint hearing. Yet, the Court's analysis is instructive. The Court recognized that when two parties have property rights in contested assets, a due process analysis must comprehend both interests:

> The reality is that both seller and buyer had current, real interests in the property, and the definition of property is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well.

Id. at 604, 94 S.Ct. at 1898. Similarly, our due process analysis must countenance not only the possible prejudice to appellants' Sixth Amendment rights, but also

the government's claim to title in the assets. Furthermore, critical to the Supreme Court's decision upholding the Louisiana sequestration statute was the "judicial control of the process from beginning to end." *Id.* at 616, 94 S.Ct. at 1904. Here too, the district court controls the pretrial restraint and sequestration process from beginning to end. Specifically, the district court in this case issued warrants freezing the appellants' bank accounts based on DEA affidavits describing how the accounts were connected with criminal activity. Thus, the district court's probable cause determinations provided a significant check on the government's power to restraint legitimate, nonindicated assets.

[9] We conclude that the balance of *Barker* factors indicates that in this case the delay of a post-restraint hearing until trial was reasonable. There is no bright line dictating when a post-restraint hearing must occur, *United States v. $8,850*, 461 U.S. at 562, 103 S.Ct. at 2010, and, as here, the Speedy Trial Act ensures that the trial will occur promptly. Therefore we find no violation of appellant's rights to due process of law.[7]

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7. *Contra Moya-Gomez*, 860 F.2d at 729 (absence of a hearing in 21 U.S.C. §853 violates due process when pretrial restraints render a defendant indigent); *Grove Condominium*, 853 F.2d at 1449 (lack of hearing on the merits violates due process); *United States v. Crozier*, 777 F.2d 1376, 1383 (9th Cir. 1985) (absence of a hearing violates due process).

E. The Potential for Prosecutorial Abuse

[10] The statutory scheme of section 853 appears to provide an opportunity for prosecutorial abuse. Here, the same government which proposes to convict the defendant at trial has, as a part of its activity, restrained the use of his apparent assets so that he may have to conduct his defense as a pauper with the attendant limitations upon choice of counsel, pretrial investigation and preparation. Appearances would be less alarming if, for example, one who appears to be wealthy is indicted for a serious crime and, contemporaneously, some financial institution files an attachment of all of the defendant's assets. In such a case, the fact that the defendant is, at the

time he must prepare for trial, without use of his restrained funds would not be the result of the prosecutor's action. Here, however, the same government that prosecutes also restrains alienation of assets and does so upon an *ex parte* showing of probable cause. There is the possibility that prosecutors will seek broad, sweeping restraints recklessly or intentionally encompassing legitimate, non-indictable assets. The loss of such legitimate assets would improperly cripple a defendant's ability to retain counsel.

Nevertheless, we agree with the Fourth and Tenth Circuits that possibility of prosecutorial abuse does not render the forfeiture statute unconstitutional. *See Caplin & Drysdale*, 837 F.2d at 648; *Nichols*, 841

F.2d at 1508. "Courts have ample tools for dealing with situations where prosecutorial misconduct threatens the fairness of the trial." *Caplin & Drysdale*, 837 F.2d at 648. If the defendant proves at trial or in a collateral proceeding that prosecutors, acting in bad faith, restrained assets which they knew or should have known to have no connection with criminal activity, a conviction would be in great jeopardy due to a denial of the Sixth Amendment right to counsel of choice. *See United States ex rel. Ferenc v. Brierley*, 320 F.Supp. 406 (E.D.Pa. 1970) (defendant's petition for habeas corpus granted because the government violated the Sixth Amendment right to counsel of choice in detaining assets not allegedly involved in the of-

fense charged); *People v. Holland*, 23 Cal.3d 77, 151 Cal. Rptr. 625, 588 P.2d 765 (1978) (government's failure to return legitimate assets to the defendant constituted a denial of the right to counsel of choice mandating reversal). But where, as here, no prosecutorial bad faith is evident, and the district court has made a determination of probable cause, either on his own or upon the grand jury's return of the indictment, there has been no improper denial of defendant's Sixth Amendment right to counsel of choice.

2. The Striking of Surplus Information from the Indictment.

[11] We next consider whether the district court improperly modified the indictment. The second superceding

indictment charged forty-one defendants with numerous violations of federal narcotics laws. To make the case more manageable, the district court severed the case into three separate trials. The appellants' case was the second to be tried. Accordingly, at the pretrial conference, the district court ordered the prosecutor to strike from the indictment allegations and information concerning co-defendants who appeared in separate trials or who had already pled guilty. The prosecutor complied, supplying copies of the revised indictment to the appellants. In addition, the appellants requested further modifications of the indictment following the government's case-in-chief. For example, counsel for Carlos Caraballo, Sr.

stated, "I want the names eliminated from the indictment that have nothing to do with this case." The appellants also requested that certain words in the indictment relating to their overt acts of drug smuggling be stricken. No defendant asked that extraneous charges be put back into the indictment to be used in this trial. the district court granted many of these requests, frequently over the government's objection. In the end, the Assistant U.S. Attorney retyped and renumbered the modified indictment. Without objection from the appellants, the modi-

fied indictment was presented to the jury for its deliberation.[8]

On appeal, the Caraballo appellants and Jeffrey Bissell make two arguments concerning the revision of the indictment. First, they argue that the failure of the court and the prosecutor to preserve a copy of the modified indictment for appeal violates due process. Second, the revisions of the indictment, together with the court's jury charge, constituted actual and constructive amendments to the indictment without their "informed consent." The appellants contend that actual amend-

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8. Unfortunately, neither the appellants nor the government preserved a copy of this modified indictment for the record in this case.

ments occurred when the prosecutor deleted portions of the indictment, while the constructive amendment occurred when the district judge instructed the jury in accordance with the modified indictment rather than the original one. The effect of these amendments was to transform the indictment from one alleging a twenty-nine person RICO conspiracy in Count 1 to a smaller sixteen-person conspiracy. The appellants contend that this significant alteration of the indictment violated their Fifth Amendment right to be tried only on charges alleged by a grand jury. We disagree.

At the outset, we note that the record in this case is sufficient to allow us to reconstruct the revisions of the indict-

ment, and so we dismiss appellants' due process concerns. More importantly, our scrutiny of the revisions persuades us that no amendments to the indictment, actual or constructive, occurred in this case.

[12] The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...." U.S. Const amend. V. The purpose of this clause is to limit the jeopardy of an accused "to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960). Therefore, an indictment is

amended in violation of the Fifth Amendment when it so altered as to charge a different offense from that found by the grand jury. *United States v. Miller*, 471 U.S. 130, 144-145, 105 S.Ct. 1811, 1819-1820, 85 L.Ed.2d 99 (1985). However, it is not unconstitutional for a defendant to be tried on a *narrower* theory of misconduct than that alleged in the indictment. *Id.* In *Miller*, the indictment charged the defendant with mail fraud, alleging that he had defrauded his insurer in connection with a burglary by (1) consenting to the burglary and (2) by lying to the insurer about the value of the loss. *Id.* at 132, 105 S.Ct. at 1813. The government's evidence concerned only the latter allegation, and the defendant was convicted.

The issue presented in *Miller* was whether a violation of the Fifth Amendment's grand jury guarantee occurred when the defendant was tried and convicted for a fraudulent scheme much narrower, although included in, the scheme alleged in the indictment. *Id.* at 131, 105 S.Ct. at 1812. The Court held that no Fifth Amendment violation occurred when trial evidence narrowed the indictment's allegations without adding any new offenses. The Court wrote:

> As long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means of committing the same crime.
>
> ....
>
> Convictions generally have been sustained as long as the proof upon which

> they are based corresponds to an offense that was clearly set out in the indictment. *A part of the indictment unnecessary to and independent of the allegations of the offense proved may normally be treated as "a useless averment" that "may be ignored."*

Id. at 136, 105 S.Ct. at 1815 (quoting *Ford v. United States*, 273 U.S. 593, 602, 47 S.Ct. 531, 534 71 L.Ed. 793 (1927) (emphasis added).

Here the district court struck only those parts of the indictment relating to persons and events having little bearing on appellants' trial. The majority of surplus information struck from the indictment resulted from the appellants' requests. Neither the prosecution nor the judge added any new offenses, actually or constructively, to those charged originally by the grand jury. Instead, the

government's evidence focused on the appellants' involvement in a felonious scheme that was narrower than, although included in, the scheme alleged in the original indictment. This result is expressly permitted by *Miller*. In addition, Federal of Criminal Procedure 7(d) allows "the court on motion of the defendant [to] strike surplusage from the indictment or information." Having exercised this right successfully, the appellants cannot now claim error. *See Capella v. Zurich General Acc. Liability Ins. Co.*, 194 F.2d 558, 560 (5th Cir.

1952) (counsel may not invite error and then complain of it).[9]

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9. The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

III. CONCLUSION

For the foregoing reasons, the convictions and sentences of Rolando Zaldivar and Carlos Caraballo-Lujan under counts 11 and 12 are VACATED. In all other respects, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 87-8246 & 87-8395

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

JEFFREY MICHELOTTI BISSEL and
ROLAND ZALDIVAR,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING
(April 13, 1989)

BEFORE: HILL and FAY, Circuit Judges, and DUBINA*, District Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellants, Jeffrey Michelotti Bissel and Roland Zaldivar are denied.

ENTERED FOR THE COURT:

/s/ James Hill
United States Circuit Judge

*Honorable Joel F. Dubina, U.S. District Judge for the Middle District of Alabama, sitting by designation.

SUPREME COURT OF THE UNITED STATES

No. A-1053

Rolando Zaldivar,

Petitioner

v.

United States

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including July 12, 1989.

/s/ Anthony M. Kennedy
Associate Justice of the
Supreme Court of the United States

Dated this 29th
day of June, 1989.